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In the Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 462 & 463

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
STEWART L. UDALL, SECRETARY OF THE INTERIOR,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

WASHINGTON STATE SPORTSMEN'S COUNCIL, INC.
OREGON WILDLIFE FEDERATION
FISHERMEN'S COOPERATIVE ASSOCIATION, INC.
NORTHWEST FISHERIES ASSOCIATION
ALASKA FISHERMEN'S UNION
PACIFIC FISH CONSERVATION LEAGUE
MAKAH INDIAN TRIBE

Intervenors
(on this brief)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT INTERVENORS IN OPPOSITION

Respondent Intervenors pray that the petitions of Washington Public Power Supply System and the Secretary of the Interior for respective *Writs of Certiorari* be denied for the reason that the questions decided by the lower Court have already been settled by this Court.

REASONS FOR DENYING WRIT ON PETITION OF WASHINGTON PUBLIC POWER SUPPLY SYSTEM

THERE IS NO QUESTION OF FIRST IMPRESSION RAISED HERE, SINCE THE LOWER COURT MERELY FOLLOWED THE WELL SETTLED RULE OF ADMINISTRATIVE LAW THAT A COURT'S FUNCTION IS LIMITED TO DECIDING WHETHER THE ADMINISTRATIVE INTERPRETATION HAS WARRANT IN THE RECORD AND A REASONABLE BASIS IN LAW.

The Federal Power Commission, in interpreting the pertinent sections of the Federal Power Act, held that the priority afforded to a preliminary permit under Section 5 of the Act was not limited to the particular sites proposed in the application for such permit, but extended to a project on another site found best adapted to a comprehensive development of that same reach of river.

In sustaining the Commission's decision, the Court of Appeals held as follows:[1]

> "Where an administrative agency must and does initially determine the specific application of a statutory provision, as the Commission has done in these cases, the reviewing Court's function is limited to deciding whether the administrative interpretation has 'warrant in the record' and a reasonable basis in law.'" (citing cases)
>
> * * * * * *
>
> "We hold that, measured by the guidelines of these cases, the Commission had the authority and the duty to interpret the priority provision in the first instance, and its interpretation should be af-

[1]Petitioner's Appendix A, p. 10a.

firmed unless it is unreasonable as a matter of law or clearly contrary to Congressional policy."

Petitioner's sole reason why this Court should grant the Writ is that the Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this Court".[2] The above quoted holding of the Court, however, does not raise a question of first impression but is, rather, a principle of law already settled by this Court in the landmark case of *Gray v. Powell*.[3]

Gray v. Powell arose out of a petition to review an order of the Director of the Bituminous Coal Division of the Department of the Interior. Petitioners were receivers of a railway company, and, as such, held leases on coal lands mined for them by independent contractors. The coal produced therefrom was all used by them in their railway operation. They applied for an exemption from the price-fixing provisions of the Bituminous Coal Act, which provided that such price-fixing provisions "shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him". The receivers asserted that they were producers consuming their own coal. Section 17 (c) of the Act provided that "the term 'producer' includes all ". . . receivers engaged in the business of mining coal". The Director denied their claimed exemption because they had independent contractors mine the coal for them.

On review, the Court of Appeals reversed the agency order, declaring that "the decision of the Director is

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[2]Rule 19, Supreme Court Revised Rules.

[3]314 U.S. 402; See also two earlier cases discussing this doctrine, *Rochester Telephone Corp. v.* U.S., 307 U.S. 125, and *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177.

not supported by substantial evidence and is based upon error of law."[4] In defining the term "producer" of coal under the Coal Act, the Circuit Court saw no difference between the owner of a mine digging the coal himself with his own employees and one who had the coal dug for him by an independent contractor; in either case, as long as the owner consumed the coal, the purpose of the exemption was accomplished.

This Court, however, reversed the Circuit Court, holding that the Court should not interfere with the administrative interpretation of the exemption provisions of the Coal Act. This Court felt that its decision could not be based upon independent judicial determination of whether petitioners came within the statutory terms. Instead, Justice Reed, speaking for the Court, invoked the following legal principle:

> "In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here by §§4-II(1) and 4-A, the function of review placed upon the courts by §6(b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner."
>
> * * * * * *
>
> "Where as here a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. Certainly a finding on Congressional reference that an admittedly constitutional act is

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[4] *Powell v. Gray*, (4th Cir.) 114 F.(2d) 752 at 757.

applicable to a particular situation does not require such further scrutiny. Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director. (citing cases)"

* * * * * * *

"... Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the tasks entrusted by the Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed."[5]

This Court again applied the *Gray v. Powell* doctrine in the *Aragon* case[6] where, in again reversing the Court of Appeals, it stated:

"To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. *The 'reviewing court's function is limited.' All that is needed to support the Commission's interpretation is that it has 'warrant in the record' and a 'reasonable basis in law'.*"[7] (emphasis supplied)

The Circuit Court in the instant case merely followed the mandate of this Court set forth in the last two under-

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[5]Id at 411-413.

[6]*Unemployment Compensation Commission of Alaska, v. Aragon*, 329 U.S. 143.

[7]Id. at 153-154.

scored sentences of the foregoing quote from the *Aragon* case. The rule has become well settled.[8]

In the instant case the Federal Power Commission defined the scope of the priority afforded to a preliminary permit. The determination it made, we submit, was not only reasonable, it was right, especially when compared with the administrative determination in the *Gray* case.

Since the Court of Appeals applied the well settled *Gray* and *Aragon* doctrines and sustained the Commission, we submit there is no reason for this Court to review the matter.

ARGUMENT IN ANSWER TO PETITIONER, WASHINGTON PUBLIC POWER SUPPLY SYSTEM

I. LOWER COURT DID NOT REJECT PUBLIC AGENCY PREFERENCE OF SECTION 7 OF THE ACT, BUT MERELY ACKNOWLEDGED THE EXCEPTION IN THAT SECTION WHERE A PRELIMINARY PERMIT HAS BEEN ISSUED, AND AFFIRMED THE PRIORITY AFFORDED A PRELIMINARY PERMITTEE UNDER SECTION 5, AS SUCH PRIORITY WAS DEFINED BY THE COMMISSION.

1. Lower Court did not render a "benchmark decision", but merely followed well settled rule of supporting administrative interpretation of statute where it has "warrant in the record" and a "reasonable basis in law".

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[8] *NLRB v. Hearst Publications*, 322 U.S. 111; *NLRB v. Atkins & Co.*, 331 U.S. 398; *Dobson v. Commissioner*, 320 U.S. 489; *Gregg Cartage Co. v. United States*, 316 U.S. 74; *SEC v. Chenery Corp.*, 332 U.S. 194.

(In all of the foregoing cases, the Supreme Court, in upholding the administrative determination, granted *certiorari* and reversed the lower court.)

Petitioner argues on page 12 of its brief that this is a "benchmark decision". This is not so. The lower Court merely followed the well settled doctrines of the *Gray* and *Aragon* cases, as previously described in this brief, that the reviewing Court is bound by the administrative interpretation of a statute if it has "warrant in the record" and a "reasonable basis in law".

2. The term "reach" has been well understood by the Commission and all parties to this action.

Petitioner contends on page 13 of its brief that it does not understand the meaning of the term "reach". As pointed out in the Commission's "opinion and order granting license" (issued February 5, 1964),[9] the parties, including petitioner, entered into a stipulation at the pre-hearing conference on this matter defining the "common reach" of the river. We should presume that, at least, petitioner understood the meaning of the term "reach" at that time and should not have forgotten so soon.

3. The decision does not nullify the Congressional policy of preference to public agencies but merely applies the exception "where a preliminary permit has been issued".

Petitioner argues on pages 13-17 of its brief that the decision nullifies the public preference provision of Section 7 of the Act. It must first be remembered that Section 7 only grants a preference to public agencies "where no preliminary permit has been issued". The Congressional policy granting priority to a preliminary permittee under Section 5 should have, at least, equal standing with the provisions of Section 7 granting a preference to public agencies "where no preliminary permit has been issued". Petitioner, however, is disturbed that the

[9]Petitioner's Appendix D, p. 29a, n. 10.

priority of the preliminary permit extends to all potential projects on the same river reach, even though the original application may not have included all such projects. Petitioner, of course, had the same opportunity as anyone else to protest the Company's preliminary permit application in 1955, since it knew, or should have known, that the projects proposed by the Company at that time would preclude construction of any competing project. Petitioner could have, at that time, sought a preliminary permit to examine the Nez Perce site, or any other site, on the same river reach in order to preserve its priority. Instead, it chose to wait three years and then apply for a license to construct the Nez Perce Project. It then waited three additional years before it abandoned the Nez Perce Project and attempted to expropriate the Company's High Mountain Sheep Project. This attempted expropriation, of course, occurred after the Company had spent several million dollars on examinations and surveys to discover the "best adapted" project. In this connection, it is grossly unfair for petitioner to contend that its High Mountain Sheep Development was taken away from it and given to the Company. It was certainly far easier and less costly for Petitioner to expand the capacity of a project already painstakingly discovered by the Company than it was for the Company to undertake the elaborate examinations and surveys required to discover the project in the first place.

Petitioner suggests that the Company should have applied for an amendment to its preliminary permit instead of applying for a license to construct the High Mountain Sheep Project. Chairman Swidler, in his dissent, suggested the allowance of such amendments to obtain the needed flexibility:

> "To be sure, it is desirable that an applicant be allowed flexibility and be encouraged to study all reasonable alternatives, including those not known at the time of application for a permit. The way to obtain this flexibility, however, is by allowance of needed amendments; . . ."[10]

The Commission majority answered this contention as follows:

> "Our dissenting colleagues also recognized the need for flexibility and attempt to avoid any interpretation of a permit which would impose the 'impossible demands' of requiring parties to guess in advance of exploratory studies conducted under a permit. The minority solution, i.e., filing of amendments to permits, is incomplete because the all important question remains: Does a party having a permit have a right to an amendment to the permit for a project concerning the same stretch of the river? The minority carefully fails to answer this critical point. If they answer negatively, their solution is frustrating and fatuous since it would encourage parties to perform useless activities. If they answer affirmatively, they are simply imposing additional filing requirements of no substance since, in effect, a party obtains priority to a given stretch of the river under the original permit."[11]

Commissioner Black, in his dissent, even suggested that the granting of an amendment would be automatic:

> "An applicant would obviously be entitled to routine approval of an amendment to his permit, in appropriate cases, where his exploration at the proj-

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[10]Dissenting opinion, Petitioner's Appendix, p. 133a.

[11]Majority opinion, Petitioner's Appendix, pp. 59a-60a.

ect site indicated that changes in the project were desirable."[12]

To guess ahead of time the exact location and description of the "best adapted" project is an impossible task. Congress could not have demanded this and the Commission agrees. The solution for a public agency to protect its preference, if it contemplates a project on a certain river reach, is to protest a preliminary permit application covering such reach and apply for its own preliminary permit. If the public agency, on the other hand, chooses to quietly wait until the permittee expends large sums of money on examinations and surveys and goes beyond the boundaries of his permit to find the "best adapted" project, then we submit, it is too late for such agency to come forth and demand its preference. We cannot assume Congress intended to be so unjust.

4. The decision does not compel the development of an entire waterway to be put into "deep freeze" by issuance of a permit since the Commission retains control over the activities and good faith of the permittee.

Petitioner argues, on pages 18-19 of its brief, that a river reach will be placed in "deep freeze" while a permittee is making up his mind how far to roam outside his permit. Section 5 of the Act provides in part as follows:

> "Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferrable, and may be cancelled by order of the Commission upon failure of permittees to comply with the conditions there-

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[12]Dissenting opinion on rehearing, Petitioner's Appendix, p. 149a.

of or for other good cause shown after notice and opportunity for hearing."

If a public agency does not choose to apply for a preliminary permit to develop a reach of river, it can at least urge the Commission, by protesting a permit, to impose stringent requirements on the permittee to compel him to act in good faith and work diligently toward discovering the "best adapted" project. The Commission at all times has the right to cancel his permit if he does not comply with its requirements. The procedure is such that the Commission may compel whatever requirements are necessary in order to be assured of discovering the "best adapted" project.

5. "Flexibility" can only be achieved by adopting the Commission's determination in this case.

Petitioner, on page 20 of its brief, suggests that a permittee may obtain "priority" upon a river's whole "reach" provided he applies for a permit for the investigation of all sites on such reach. This has never been done since it is not necessary. Regulation 4.30 contemplates that a permittee's priority will be protected on the entire reach regardless of the number of sites described in his permit.

Although the administrative definition of the priority afforded by a preliminary permit, as applied in this case, has not previously been reviewed by the Courts, the Federal Power Commission has maintained a consistent position by reason of its long standing regulation 4.30, which provides:

> "An application for license may be filed by any citizen, association of citizens, corporation, State, or Municipality desirous of obtaining a license pursuant to the Act: *Provided, however, That if a pre-*

liminary permit has been issued, no action on applications by others than the permittee covering in whole or in part the same reach of stream or streams shall be taken that might infringe on the rights of the permittee under Sections 5 and 7 of the Federal Power Act." (emphasis supplied)

In order for the foregoing underscored proviso to have any meaning, the preliminary permittee's priority must extend beyond the sites set forth in his permit so long as they remain within the same reach of stream or Streams. Otherwise, there would seem to be no apparent reason why a license application covering some other part of the same reach would "infringe on the rights of the permittee" if he had no rights in such other part, as contended by the petitioner. Presumably, such license application would be fully examined by the Commission and the new proposed site would be compared with the permittee's site in order to determine which of the two sites, as well as any other site on the same reach, would meet the best adapted requirements of Section 10(a) of the Act.

At this point, if petitioner's contention was correct, the permittee's priority would prevail *only* if the Commission found his site to be the "best adapted" site. He must, therefore, have more rights than this, if no action on applications can be taken while his permit is in effect.

II. THE COURT OF APPEALS HAS DECIDED FEDERAL QUESTIONS IN THIS CASE CONSISTENT WITH WELL SETTLED DECISIONS OF THIS COURT.

1. There is no conflict with this Court's decisions concerning grants of privileges in public lands and navigable waters.

Petitioner argues on pages 21-25 of its brief that to permit a preliminary permit to affect lands and waters beyond the boundaries described in the original permit would conflict with existing laws. Section 10(a) provides that if it is necessary in order to secure the plan best adapted to a comprehensive development of a waterway "the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval". This clearly authorizes the Commission to license a project which would affect lands and waters beyond the boundaries of the original permit or license application. Homesteaders, mineral locators and other investors in public lands should always anticipate that the lands in which they have an interest might conceivably be affected by a hydro-electric project or any other public project. If they have a vested interest in such lands, they will be compensated under the eminent domain provisions of Section 21 of the Act. It is true that the Act and regulations contemplate the segregation of public lands to be affected by any project described in a preliminary permit. This certainly does not imply that additional or different lands will not be affected by the project which is ultimately licensed. It is only done, we submit, in the hope that, at least, a portion of the lands segregated will be affected by the project ultimately licensed. It is felt that this, at least, is more desirable to reduce hardship than not to segregate any lands at all in the first instance.

If state and federal agencies desire to set aside certain lands for public use, which could be affected by a future hydro-electric project, then it would behoove these agencies to urge Congress to pass legislation setting aside these lands for this purpose. This will effectively preclude the expansion of a preliminary permit.

2. The decision below did not misapply the rule of the *Hearst* case.[13]

Petitioner argues on pages 25-26 of its brief that the Court of Appeals misapplied the rule in the *Hearst* case. It argues that the following language, which the lower Court did not quote, is applicable in this case:

> "... Undoubtedly, questions of statutory interpretation, *especially when arising in the first instance in judicial proceedings*, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." (emphasis supplied)

This is clearly not a case "arising in the first instance in judicial proceedings". The above quote refers to a situation where an action is commenced in Court and administrative officers act as witnesses rather than in a *quasi* judicial capacity. This, on the other hand, is a case, falling under the quoted language of the Court, "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially". The lower Court, therefore, followed the well settled rule adopted in the *Hearst* case that its reviewing function was limited to deciding whether the administrative interpretation has "warrant in the record" and a "reasonable basis in law".[14] This matter initially arose on a license application before the Federal Power Commission. The Federal Power Act authorized the Commission to define the scope of the term "priority" afforded to a preliminary permit under Section 5 of the Act. This the

[13] *National Labor Relations Board v. Hearst*, 322 U.S. 111.

[14] *Unemployment Compensation Commission of Alaska v. Aragon*, 329 U.S. 143 at 153-154.

Commission did.[15] The Court of Appeals decided that its interpretation had "warrant in the record" and a "reasonable basis in law". We, therefore, submit that this is precisely the kind of case where the *Hearst* rule is most applicable.

3. An application to amend the preliminary permit in this case would have been a useless act.

Petitioner argues on pages 27-29 of its brief that pursuant to regulation 4.84, the Company should have applied for an amendment of its preliminary permit, to include the High Mountain Sheep Project, rather than applying, as it did, for a license covering the same project. As previously discussed in this brief the Commission felt that such an application for amendment would have been a useless act since the license application accomplished the same purpose. Under the most reasonable and practical interpretation of regulation 4.30, as previously discussed, a permittee would retain his priority over any project on the same river reach, even though it was not described in his original permit. This being the case, we submit that any interested party on an application for an amendment of permit, even a public agency, would only have the right to oppose any new site proposed in the application, but would not have the right to substitute itself for the applicant. This same right would exist on a license application. In fact, that was the case here where petitioner opposed the Company's High Mountain Sheep Project and, as an alternative, proposed the Nez Perce Project. Since petitioner's position was no different at the license hearing than it would have been at a permit amendment hearing, it has not been prejudiced.

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[15]Commission Finding No. 10, Petitioner's Appendix, p. 77a.

REASONS FOR DENYING WRIT ON PETITION OF SECRETARY OF THE INTERIOR AND ARGUMENT IN ANSWER TO SECRETARY.

I. SECRETARY SETS FORTH NO REASON UNDER RULE 19 OF THIS COURT'S REVISED RULES TO JUSTIFY BEING GRANTED THE WRIT.

The principal question raised by the Secretary is whether in this case the Commission could issue a license "without having conducted its own factual investigation to the extent necessary to assure a full record on the desirability of federal development", and secondly, "whether the Commission was excused from such inquiry by the failure of the Secretary of the Interior to make timely application for leave to present evidence in support of federal development".[16] The Secretary sets forth no reason, and we contend there is no reason, under Rule 19 of this Court's Revised Rules to justify the granting of the Writ, such as the existence of an important federal question which has either not been settled by this Court or has been decided in a way in conflict with applicable decisions of this Court. Apparently, the Secretary merely questions the Commission's judgment in deciding against federal development, and whether such judgment was based on sufficient evidence.

II. COMMISSION'S DECISION AGAINST FEDERAL DEVELOPMENT MUST STAND UNLESS IT "HAD NO BASIS IN EVIDENCE AND SO WAS DEVOID OF REASON".

In the lower Court, the Secretary argued that Congress had pre-empted the High Mountain Sheep site "in its comprehensive plan for regulating the flow of the waters of the Columbia River System". This argument, however, fell squarely in the face of the *Roanoke Rapids*

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[16]Secretary's Brief, p. 2.

Case,[17] in which this Court rejected a similar argument. The Secretary next argued that the Federal Power Act forbids the Commission to license for private development a project that will affect existing or planned federal development of water resources, referring to the federal dams on the Lower Columbia River. The lower Court pointed out, however, that there is no law which requires all dams in a waterway to be federal if one federal dam exists there. The Secretary next argued that the Commission was arbitrary in not permitting him to offer evidence respecting federal development more than a year after the hearing had been concluded. Since he had waited so long, the Commission's ruling was obviously not an abuse of discretion. The Secretary, however, now takes a different tact. He argues that the Commission should have conducted its own factual investigation respecting federal development. It is for the Commission, however, and not the Secretary, to decide whether it has enough evidence to reach this decision. The language of this Court in the *Roanoke Rapids* case is apt:

> "Once recognizing, as we do, that the Commission was not deprived of its power to entertain this application for a license, we cannot say, within the limited scope of review open to us, that the Commission's findings were not warranted. Judgment upon those conflicting engineering and economic issues is precisely that which the Commission exists to determine, so long as it cannot be said, as

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[17] *United States ex rel Chapman v. Federal Power Commission*, 345 U.S. 153.

See also: *National Hells Canyon Association v. Federal Power Commission*, 237 F.(2d) 777, in which this Court denied *certiorari*.

it cannot, that the judgment which it exercised had no basis in evidence and so was devoid of reason."[18]

The Secretary argues that the Commission's determination against federal development was based on no evidence because its decision makes several references to there being no evidence to support the Secretary's position. This, however, does not mean that there was no evidence to support the Commission's position. The fact that there would be probable delay of federal development, even if there was assurance that Congress would act, which there is not, is, we submit, enough evidence to prevent the decision from being "devoid of reason".

We submit that the evidentiary test adopted by this Court to review the judgment of the Commission is well settled. We feel that the Commission, under the record herein, has more than met that test.

CONCLUSION

We respectfully urge that neither petition herein be granted for the reason that the decision of the Court of Appeals with respect to both petitioners was based on well settled principles of administrative law concerning the scope of review of administrative determinations. The test applicable to the petition of WPPSS is not whether the determination is the only reasonable one, or even that it is the result the Court would have reached, but whether the administrative determination had "warrant in the record and a reasonable basis in law". The test applicable to the Secretary's position is whether the Commission finding against federal development had

[18] 345 U.S. 153 at 171.

some basis in evidence so as not to be devoid of reason. We respectfully submit that here the respective tests were more than met.

Respectfully submitted,

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